APPEAL NO. 030704
FILED APRIL 30, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on February 19, 2003. The hearing officer determined that the appellant (claimant) reached maximum medical improvement (MMI) on April 1, 2002, with a 10% impairment rating (IR). The claimant appeals this decision. The respondent (carrier) urges affirmance.

DECISION

Reversed and remanded.

The evidence reflects that the claimant sustained a compensable back injury on _____. He was initially examined by the Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. B, on May 4, 2000, at which time Dr. B determined that the claimant had reached MMI with a 7% IR. The claimant's treating doctor, Dr. N, disputed the certification and the Commission sent a letter to Dr. B requesting clarification. In a letter dated June 15, 2000, Dr. B confirmed his initial opinion that the claimant reached MMI on April 1, 2000, with a 7% IR. In the latter part of 2000, the claimant underwent several Intradiscal Electrothermal Therapy (IDET) procedures and Dr. B was subsequently asked whether the IDET procedures would cause him to change his opinion regarding MMI/IR. Dr. B responded, requesting to reexamine the claimant. On November 21, 2000, Dr. B reexamined the claimant and determined that he had not yet reached MMI. On April 1, 2001, Dr. B examined the claimant for a third time and determined that the claimant reached MMI on the same date with a 10% IR. The documentary evidence reflects that Dr. B was not thereafter requested by the Commission to give an opinion or clarification and his involvement in the claimant's case apparently ended with the third certifying examination.

The parties stipulated that the date of statutory MMI was September 21, 2001. Although some of the medical records reference that a fusion was proposed prior to the date of statutory MMI, the first medical record reflecting a surgical consultation is dated January 22, 2002. The claimant underwent back surgery in April 2002. In May and again in July 2002, Dr. N requested that the claimant be examined again by a designated doctor to render an opinion as to MMI/IR. This did not occur and on August 21, 2002, Dr. N submitted a Report of Medical Evaluation (TWCC-69), reflecting that the claimant reached MMI on July 29, 2002, which is beyond the date of statutory MMI, with a 31% IR.

The hearing officer determined that the claimant reached MMI on April 1, 2000, with a 10% IR, and explained in the Statement of the Evidence that the date of statutory MMI is the "cut-off point where the interest in finality of an IR certification outweighs a claimant's right to 'revisit' a prior certification." We disagree. In Fulton v. Associated

Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied) the court held that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) (90-day Rule), which restricted the time period for disputing an IR, was invalid because it also implicitly restricted the statutory time period for assessing a final date of MMI. While we recognize the need for finality in MMI and IR determinations, we find no authority to support the hearing officer's contention that the date of statutory MMI is the cut-off for determining the IR. Following the decision in Fulton, the Commission repealed Rule 130.5(e) effective January 2, 2002, and the Commission has not since adopted a new rule limiting the time for disputing an IR. In the absence of express authority limiting the time for disputing an IR certification, we reverse the hearing officer's decision that the claimant reached MMI on April 1, 2000, with a 10% IR and remand this case for the appointment of a second designated doctor to examine the claimant and render an opinion as to MMI/IR. The Appeals Panel has held that a designated doctor should not be replaced by a second designated doctor absent a substantial basis for doing so; however, in this case, as Dr. B. is a chiropractor, it is necessary to appoint a doctor who is qualified to rate cases involving spinal surgery in accordance with Rule 130.5(d)(2)(C).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **L. M. INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL, SUITE 2900
AUSTIN, TEXAS 75201.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Daniel R. Barry
Appeals Judge